**UNITED STATES DISTRICT COURT**

**DISTRICT OF MAINE**

| | | |
|---|---|---|
| **THE BUTCHER COMPANY, INC.,** | ) | |
| | ) | |
| **PLAINTIFF** | ) | |
| | ) | |
| **v.** | ) | **Civil No. 00-139-P-H** |
| | ) | |
| **GUY BOUTHOT AND BOUTHOT CONSTRUCTION, INC. D/B/A THE ODORITE COMPANY,** | ) | |
| | ) | |
| **DEFENDANTS** | ) | |

**ORDER ON MOTION TO DISMISS COUNTERCLAIM**

The motion to dismiss the antitrust counterclaim is **GRANTED**.

The Odorite Company ("Odorite") brings this antitrust counterclaim against The Butcher Company ("Butcher") for terminating Odorite as a dealer. Odorite concedes that it can maintain the counterclaim only as a per se violation of Sherman Act section 1, 15 U.S.C.A. § 1 (West 1997). To that end, Odorite alleges an illegal agreement amounting to a vertical restraint between Butcher and another distributor, Clean-O-Rama, a competitor of Odorite.

The United States Supreme Court has held "that a vertical restraint is not illegal per se unless it includes some agreement on price or price levels." Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 735-36 (1988). Here, Odorite has failed to allege sufficiently either the price level or the agreement. On price level, it says only that Butcher insisted that Odorite quote list prices on any account

where Clean-O-Rama was also bidding. There is no allegation that any agreement between Butcher and Clean-O-Rama said anything about the price Clean-O-Rama would bid. The counterclaim is therefore insufficient. See Ben Elfman & Son, Inc. v. Criterion Mills, Inc. 774 F. Supp. 683, 686 (D. Mass. 1991). On agreement, the one paragraph in the counterclaim that alleges an agreement, unlike every other paragraph, conspicuously begins "[o]n information and belief." Countercl. ¶ 11. Now to be sure, pleadings are to be read with some liberality, and are framed without the benefit of discovery. But the First Circuit has also cautioned that in the area of antitrust law, conclusory allegations of a conspiracy or agreement should be carefully assessed. DM Research Inc. v. Coll. of Am. Pathologists, 170 F.3d 53 (1st Cir. 1999). In this case, discovery is almost complete (deadline of October 26, 2000), and the sufficiency of the counterclaim has been under attack for some time (since June 22, 2000), yet Odorite has taken no steps to provide concrete allegations to supplant its "information and belief" that a conspiracy existed. Finally, although the counterclaim alleges a threat from Clean-O-Rama to Odorite that Clean-O-Rama would cause Butcher to terminate Odorite, there is no allegation that Clean-O-Rama thereafter contacted Butcher to complain and to procure the termination of Odorite. From all that appears, Butcher could have made the termination decision independently. Under Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 761 (1984), an independent decision to terminate a price cutter is not enough. I conclude that Odorite has failed to state a claim for a per se vertical restraint.

Neither party has suggested that the analysis under Maine law is any different.

Accordingly, the counterclaim is **DISMISSED**.

**SO ORDERED.**

**DATED THIS 2ND DAY OF OCTOBER, 2000.**

_____

**D. BROCK HORNBY**
**UNITED STATES CHIEF DISTRICT JUDGE**

U.S. District Court
District of Maine (Portland)
Civil Docket For Case #: 00-CV-139

THE BUTCHER COMPANY INC.
plaintiff

JAMES C. HUNT, ESQ.
ROBINSON, KRIGER, MCCALLUM & GREENE, P.A.
P. O. BOX 568
PORTLAND, ME 04112-0568
(207) 772-6565

KIRK TESKA, ESQ.
IANDIORIO & TESKA
260 BEAR HILL ROAD
WALTHAM, MA 02451-1018
(781) 890-5678

JUDAH I LABOVITZ, ESQ.
ANN , UNGAR, SPECTOR & SPECTOR. PC
1709 SPRUCE ST
PHILADELPHIA, PA 19103
(215) 732-3120

v.

GUY BOUTHOT
defendant

CHRISTOPHER C. TAINTOR, ESQ.
NORMAN, HANSON & DETROY
P. O. BOX 4600
PORTLAND, ME 04112
(207) 774-7000

BOUTHOT CONSTRUCTION, INC.
dba THE ODORITE COMPANY
defendant

JEFFREY M. WHITE, ESQ.
PIERCE, ATWOOD
ONE MONUMENT SQUARE
PORTLAND, ME 04101-1110
(207) 791-1100